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No. 07-516

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In The Supreme Court of the United States

SUSAN KNOX, a Chief Deputy District Attorney working for the 19th Judicial District Attorney's Office, in her individual capacity,

Petitioner,

v.

THOMAS MINK; AND THE HOWLING PIG,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF *AMICUS CURIAE*, COLORADO DISTRICT ATTORNEY'S COUNCIL, IN SUPPORT OF PETITIONER

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BRIEF OF COLORADO DISTRICT ATTORNEY'S COUNCIL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Paul R. Wolff, Chief Deputy District Attorney for the 18th Judicial District of the State of Colorado, on behalf of the Colorado District Attorney's Council ("CDAC") *Amicus Curiae*, respectfully files this brief in support of Chief Deputy District Attorney Susan Knox's petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit ("Tenth Circuit") entered in this case.[1] Mr. Andrew Ringel, Esq., counsel for Susan Knox, and Mr. Bruce Jones, Esq., counsel for Thomas Mink and the Howling Pig, have given written consent that they do not object to CDAC participating as *amicus curiae*. (*See* Appendices A and B) Previously, CDAC's motion to enter as *amicus* in the Tenth Circuit was also unopposed by these parties.

I. INTEREST OF *AMICUS CURIAE* CDAC

The Colorado District Attorneys Council (CDAC) is a separate legal entity of government that, *inter alia,* represents the interests of the district attorneys in the State of Colorado. The adverse ruling by the

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[1] The parties were notified ten days prior to the due date of this brief of the intention to file. The parties have consented to the filing of this brief. Counsel for CDAC authored this brief in whole. No other entity or person made any monetary contribution to the preparation or submission of this brief.

Tenth Circuit against Chief Deputy District Attorney Knox affects all prosecutors in the state of Colorado as well as prosecutors in other states. The Tenth Circuit's ruling severely affects district attorneys for two main reasons.

First, district attorneys will be deterred from exercising independent judgment when they review search warrant affidavits at the direction of the court. Acting under the authority of a Colorado statute, C.R.S. § 20-1-106.1, some Colorado judges have *required* district attorneys to assist in the process of issuing search warrants by having the district attorney review such warrants and affidavits for legal sufficiency prior to the submission of those documents to the judge. If a district attorney enjoys only qualified immunity for assisting the court in performing this judicial function, the district attorney's ability to exercise independent judgment in the process will be infringed.

Second, district attorneys are greatly confused by the Tenth Circuit's opinion, because the guidance it gives prosecutors is precisely the opposite of the guidance which has emerged from previous decisions of the Supreme Court. The conflict between the Tenth Circuit's opinion and previous Supreme Court decisions creates extreme uncertainty over *how* district attorneys should participate in the process of issuing search warrants. This uncertainty will cause prosecutors to be preoccupied with defending vexatious civil litigation at the expense of focusing on their primary

responsibilities of prosecuting criminals and promoting community safety.

II. SUMMARY OF ARGUMENT

The Tenth Circuit's opinion conflicts with decisions of other federal courts and the U.S. Supreme Court regarding the type of immunity that protects a prosecutor who reviews search warrants for legal sufficiency. Some Colorado judges have exercised their statutory authority under C.R.S. § 20-1-106.1(1)(a) to *require* district attorneys to review search warrant applications for legal sufficiency before the applications are submitted to a magistrate. The district attorney's review is limited to assessing whether the police officer's affidavit establishes probable cause supporting issuance of the requested search warrant. Prosecutors should be entitled to absolute immunity for performing this review. The prosecutor does not conduct any investigation, does not render legal advice concerning the investigation, does not sign the affidavit supporting probable cause, and does not conduct the search if the warrant is authorized. A prosecutor's review of a search warrant for legal sufficiency, at the request of the court, cannot be said to be either "investigative" or "administrative." Instead, it is an advocate's function performed in conjunction with a judicial proceeding, and protected by absolute immunity under United States Supreme Court precedent.

This Court should grant the petition for certiorari and clarify that a prosecutor's review of a search warrant for legal sufficiency is entitled to absolute immunity.

III. ARGUMENT

The question in this case is whether a district attorney's review of a search warrant affidavit – conducted at the request of the court – is protected by absolute immunity in an action brought under 42 U.S.C. § 1983. Some background on Colorado practices may be helpful.

Colorado is geographically divided into twenty-two judicial districts. Each judicial district has an elected district attorney, and a number of appointed judges. By statute, Colorado's judges can *require* a district attorney to assist in the review of search warrant applications. C.R.S. § 20-1-106.1 provides, in relevant part:

> (1) The district attorneys of the several judicial districts *shall*: (a) Render, in their quasi-judicial capacity, legal advice to peace officers, upon the request of such officers *or of the court,* pertaining to the preparation and review of affidavits and warrants for arrests, searches, seizures, nontestimonial identification items, and court orders for the production of records. . . .

(Emphasis added.) Consistent with that statutory authority, the judges in Petitioner's judicial district

requested review of search warrant affidavits by the district attorney's office prior to their submission to a judge. *See* Petition for Writ of Certiorari, at 21. Because the judiciary had requested this assistance, Petitioner was statutorily mandated to review the search warrant affidavit in this case.

Not all of Colorado's judges utilize the procedure afforded by C.R.S. § 20-1-106.1. However, in a number of judicial districts, including Petitioner's, the judges have obligated the district attorneys to assist the court by reviewing search warrant affidavits for legal sufficiency. The judges presumably impose this requirement because they perceive it to be beneficial to the judicial process.

The procedure benefits the judiciary itself. If the district attorney determines that a search warrant affidavit does not establish probable cause, the affidavit likely will never be presented to a judge. This keeps judges from being inundated with search warrant applications that are wholly inadequate. When a search warrant is presented to a judge, the judge will perform an independent review, but can be assured that the district attorney has already conducted an identical review, prior to the papers being submitted to the court.

The procedure also benefits the judicial process as a whole. Judges are not infallible and, from time to time, issue a search warrant that is legally deficient. When Colorado judges require district attorneys to participate in the process of reviewing search warrant

applications, they in effect create a second hurdle over which the search warrant application must jump: both the district attorney and the judge must approve of the warrant. This provides additional protection for all citizens by better ensuring that only meritorious search warrants are issued.

In Colorado the manner of presenting a search warrant application to a judge varies by time and place. During business hours, the police officer who authored the search warrant affidavit typically will present the affidavit to the judge in the judge's chambers. Some Colorado judges require a district attorney to physically accompany the police officer when this occurs, as reassurance that the district attorney has conducted the required review. After business hours, the review of search warrant applications can be coordinated with phone calls between a duty judge, a duty district attorney, and a police officer. In the evening the police officer sometimes takes the documents to the duty judge's home, or, if the judge prefers, may send the documents by fax or email. Despite the variety of ways in which search warrant applications are submitted to the reviewing judge, Colorado does *not* have a procedure for presenting evidence in court to establish probable cause for a search warrant. In Colorado, probable cause to search must be established within the "four corners" of the search warrant affidavit.

Based on Supreme Court precedent, Petitioner's involvement in this search warrant review process should be afforded absolute immunity.

Absolute immunity for government officials in a 42 U.S.C. § 1983 action arises from historical and policy considerations. *Imbler v. Pachtman,* 424 U.S. 409, 417-30 (1976). For prosecutors, absolute immunity exists for conduct "intimately associated with the judicial phase of the criminal process." *Id.* at 430. Thus, in initiating a prosecution and presenting the State's case, a prosecutor has absolute immunity from a civil suit for damages under § 1983. *Id.* at 431. Likewise, a prosecutor enjoys absolute immunity for appearing in court to support a search warrant application and for presenting evidence at the hearing. *Burns v. Reed*, 500 U.S. 478, 492 (1991). A prosecutor's preparation and filing of an information and motion for arrest warrant also are protected by absolute immunity. *Kalina v. Fletcher,* 522 U.S. 118, 129 (1997).

By contrast, the Supreme Court has been reluctant to find absolute immunity where a prosecutor's conduct is not "intimately associated with the judicial phase of the criminal process." Absolute immunity does not extend to a prosecutor who advises police they have probable cause to make a *warrantless* arrest. *Burns*, 500 U.S. at 481-96. Likewise, a prosecutor is not absolutely immune for authorizing a *warrantless* wiretap. *Mitchell v. Forsyth,* 472 U.S. 511, 520-23 (1985). A prosecutor's involvement in gathering evidence during the early stages of an investigation – long before any form of judicial proceedings have commenced – is not protected by absolute immunity. *Buckley v. Fitzsimmons,* 509 U.S. 259,

275 (1993). Finally, a prosecutor who executes a certification of probable cause is functioning as a witness and is not entitled to absolute immunity for that conduct. *Kalina v. Fletcher,* 522 U.S. 118, 129-31 (1997). A prosecutor who functions purely as an "administrator" or investigator, "rather than as an officer of the court," is entitled only to qualified immunity. *Imbler,* 424 U.S. at 431 n.33; *Buckley,* 509 U.S. at 273-74.

Here, Petitioner functioned as an officer of the court. She reviewed the search warrant application at the request of the judiciary, and her review was identical to that which shortly thereafter was performed by the judge – an assessment of whether the affidavit established probable cause. This review process constituted a judicial proceeding. "[T]he issuance of a search warrant is unquestionably a judicial act." *Burns*, 500 U.S. at 492 (*citing Stump v. Sparkman,* 435 U.S. 349, 363 n.12 (1978)). If Petitioner's review had occurred in conjunction with a courtroom hearing for issuance of a search warrant, that review would unquestionably be protected by absolute immunity. *See Burns,* 500 U.S. at 492. Colorado, however, does not have a procedure for holding such a hearing; probable cause for issuance of a search warrant is established exclusively by affidavit, typically examined outside the courtroom.

The absence of a courtroom setting should not strip a Colorado prosecutor from the absolute immunity that protected the prosecutor in *Burns*. The duties of the prosecutor in his role as advocate for the

State include actions "apart from the courtroom" that are nonetheless entitled to absolute immunity. *Imbler,* 424 U.S. at 431 n.33; *Buckley,* 509 U.S. at 272. Informality does not alter the nature of proceedings that are, in their function, part of the judicial process. *See Stump,* 435 U.S. at 363 (petition for involuntary sterilization of minor was not given a docket number and was not filed with the clerk; judge approved petition *ex parte,* without notice or hearing, outside the courtroom, and while not in his judge's robes; Supreme Court found "no merit to [the] argument that the informality with which he proceeded rendered his action non-judicial and deprived him of his absolute immunity").

The fact that the search warrant issued without a criminal case having been filed also should not alter the analysis. A prosecutor's duties as advocate for the State "involve actions preliminary to the initiation of a prosecution" but which still are protected by absolute immunity. *Imbler,* 424 U.S. at 431 n.33; *Buckley,* 509 U.S. at 272. In *Burns*, the Court stated without qualification that a prosecutor's appearance at a search warrant hearing was "intimately associated with the judicial phase of the criminal process," and moreover was "connected with the initiation and conduct of a prosecution" – "particularly" where the hearing occurs after an arrest, but not exclusively so. *Burns,* 500 U.S. at 492. For conduct before the filing of a criminal case, absolute immunity protects the prosecutor's role "because any lesser degree of immunity could impair the judicial process itself." *Malley v.*

Briggs, 475 U.S. 335, 342-43 (1986). "Exposing the prosecutor to liability for the initial phase of his prosecutorial work could interfere with his exercise of independent judgment at every phase of his work, since the prosecutor might come to see later decisions in terms of their effect on his potential liability." *Id.*

Petitioner was engaged in the same review process as the judge: assessing whether the search warrant affidavit established probable cause. The only difference was that, after the search warrant application passed muster with the district attorney and was submitted to the judge, the judge could actually sign and issue the warrant. The fact that Petitioner's review was identical to that of the judge supports a grant of absolute immunity for her actions. In determining immunity, a court examines "the nature of the function performed, not the identity of the actor who performed it." *Forrester v. White,* 484 U.S. 219, 229 (1988).

A state, of course, cannot limit immunity under federal law, *Howlett v. Rose,* 496 U.S. 356 (1990), but it can define the actions of its officers. The Supreme Court has resolved questions of immunity by referring to the statute which defines the function in question. *See Butz v. Economou,* 438 U.S. 478 (1978) (executive branch officials who initiate and participate in adjudicatory functions before administrative agencies have absolute immunity); *Cleavinger v. Saxner,* 474 U.S. 193 (1985) (prison disciplinary committee members not entitled to absolute immunity).

C.R.S. § 20-1-106.1 defines the function of the district attorney in reviewing search warrant applications. The statute uses the term "quasi-judicial capacity" to describe the district attorney's role. Significantly, the statute does not require the district attorney to give legal advice to the police concerning their investigation; instead the district attorney's legal assessment pertains to "the preparation and review of affidavits and warrants for arrests, searches, seizures, nontestimonial identification items, and court orders for the production of records." In this regard the Colorado prosecutor's conduct is distinguishable from that addressed in *Burns*, which involved legal advice to police officers about interrogation techniques and whether there was probable cause for a *warrantless* arrest.

Under Colorado law, the prosecutor does not present the search warrant affidavit to the court, nor swear to the facts – police officers do that. *See* C.R.S. §§ 16-3-303, 16-3-305. Colorado's procedure is therefore different from the practice addressed in *Kalina*, under which prosecutors from the state of Washington functioned as witnesses by signing a certification of probable cause.

In *Kalina*, the Court emphasized that the Washington prosecutor's decision to function as a witness was not required by either state or federal law, and contrary to tradition and ethical considerations which instruct counsel to avoid participating as both advocate and witness in the same proceeding. 522 U.S. at

129-30. This emphasis implies that where a prosecutor performs a function required by law, and not inconsistent with tradition, the function is more likely to be one which is accorded absolute immunity. Colorado prosecutors are legally required to review all search warrant applications, upon request of the court, and are legally required to review all "no knock" search warrants regardless of whether any request has been made. *See* C.R.S. § 20-1-106.1(1)(a); *cf.* § 20-1-106.1(1)(b).

The Supreme Court has recognized that protecting officials with absolute immunity is, in effect, a balancing of evils. *Imbler,* 424 U.S. at 428. With absolute immunity, officials are able to exercise independent judgment in their duties, without the fear or distraction of lawsuits, but citizens lose the ability to challenge the official's conduct by seeking civil relief. *Id.* However, it is noteworthy that in the context of a prosecutor's review of search warrant applications, there already exists a significant check on the exercise of the prosecutor's judgment: the warrant will not issue unless a magistrate, exercising independent, impartial judgment, agrees with the prosecutor's assessment that the affidavit is legally sufficient. No citizen will ever be aggrieved by a district attorney's review of a search warrant application if the search warrant is not issued by the court.

The Tenth Circuit's opinion in this case makes two statements that are contrary to established Supreme Court precedent, and are completely confusing to criminal prosecutors. First, the Tenth Circuit

stressed that the prosecutor "played no role in preparing the affidavit" and expressed the view that, if she had taken such a role, "this would be quite a different case." *See* Petition for Writ of Certiorari, at 35a. But active involvement in preparing the affidavit for probable cause would have placed the prosecutor squarely in the role of a police officer – crafting the version of events to which the officer would attest – and thus within the investigative realm of police work for which qualified immunity applies. Based on *Imbler* and other Supreme Court precedent, prosecutors have been careful to restrict their involvement in the preparation of search warrants, avoiding any drafting of language, since attesting to facts is a police officer's function that is not protected by absolute immunity. The Tenth Circuit's opinion suggests that, to enjoy absolute immunity, prosecutors should do just the opposite, actively involving themselves with drafting the policeman's affidavit.

Second, the Tenth Circuit distinguished *Burns* and *Kalina* on the ground that Petitioner's function was to "provide legal advice outside the courtroom to aid a nascent investigation." Petition for Writ of Certiorari, at 36a. Yet the Supreme Court has made clear that "the duties of the prosecutor in his role as advocate for the State involve actions preliminary to the initiation of a prosecution and actions apart from the courtroom." *Imbler*, 424 U.S. at 431 n.33. A judge does not lose absolute immunity for review of a search warrant merely because a criminal case has yet to be filed. A prosecutor who performs the same

function of reviewing a search warrant for legal sufficiency – at the court's request – likewise should have absolute immunity, regardless of whether a case has been or ever is instituted.

Where a judge knows that a district attorney has reviewed a search warrant application, the district attorney's review in effect constitutes a statement to the judge: "*Your honor, the prosecution maintains that the affidavit before you establishes probable cause for issuance of the accompanying search warrant.*" This representation to the court may occur through more informal words or acts, and may occur outside a courtroom setting, but the representation nonetheless is made. From this perspective, a district attorney's compliance with a judicially imposed requirement to review search warrant applications falls squarely in the prosecutor's traditional role as advocate and officer of the court. Absolute immunity should protect such conduct. *Imbler,* 424 U.S. at 430-31 & n.33; *Burns,* 500 U.S. at 491.

The Court need not, in this case, address the broader question of whether a district attorney's review of a search warrant application is always protected by absolute immunity. Of course, the Court could choose to address that broader question in the context of Petitioner's conduct. But this case could appropriately be decided on the more limited question of whether a district attorney enjoys absolute immunity when reviewing a search warrant application at the request of the court. The petition for certiorari should be granted to clarify that – at least when such

a review is conducted in response to a judicial request – the district attorney enjoys the same degree of immunity as the judge.

IV. CONCLUSION

This Court should grant Chief Deputy District Attorney Susan Knox's petition for a writ of certiorari.

Respectfully submitted,

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